

STATE OF COLORADO

DEPARTMENT OF REVENUE

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Bill Ritter, Jr.
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GIL-2009-001

March 17, 2009

XXXXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

Re: Sales and Income tax nexus

Dear XXXXXXXXXXXXX,

This letter is in response to your request for a determination whether a company you represent has sales and income tax nexus with Colorado. I apologize for the delay in responding to your request. The Department has promulgated a regulation governing the issuance of general information letters and private letter rulings. A general information letter provides a general overview of the applicable tax law, does not provide a specific determination, and is not binding on the department. A private letter ruling is a determination of the applicability of tax to a specific set of circumstances and is binding in the department. A party requesting a private letter ruling must provide certain information and remit a fee. For more information about general information letters and private letter rulings, please refer to the Department's regulation 24-35-103.5, C.R.S., which is available on our web site at: www.colorado.gov/revenue/tax.

Although you ask for a determination, your request does not contain the information required for a private letter ruling. I will initially treat your request as one for a general information letter. You may resubmit this request for a private letter ruling.

Issue

Does your client have sales or income tax nexus with Colorado?

Background

Your client operates a call center in another state. It does not have any real or personal property in the state and its employees do not travel to Colorado. The client has a number of national retailer customers who own or rent real property in many states, including, presumably, Colorado. These retailers call the call center when they require maintenance services. Your client locates a maintenance company and engages that company to provide maintenance service for the national retailer. The client pays the maintenance company and

then bills the national retailer for the maintenance service, including a mark-up to reflect the Client's service of locating a maintenance company and ensuring that the maintenance work is performed to the satisfaction of the national retailer.

Discussion

Income tax

Colorado levies income tax on, among others, nonresident individuals and foreign corporations that derive income from sources within Colorado. See, generally, §39-22-109 and 301, C.R.S. Income derived from sources within Colorado includes income from any activities carried on within Colorado. §39-22-301(1)(b), C.R.S. A corporation is considered to be doing business in Colorado whenever it has exceeded the minimum standards set forth in P.L. 86-272 (which prohibits a state from imposing income tax on an entity whose only activities within the state is soliciting sales). Thus, for example, a foreign corporation, which sells goods to in-state consumers and engages in-state independent contractors to repair such goods, has nexus for state income tax purposes. See, Department FYI Income 58 (Colorado law is consistent with the Multi-state Tax Commission's Nexus Bulletin 95-1).¹ Whether an entity has nexus for income tax purposes is often a fact-intensive inquiry. It is beyond the scope of a general information letter to make a ruling whether a specific company has income tax nexus. You may resubmit your request as a private letter ruling where such rulings are issued.

Sales Tax.

Whether the mark-up is subject to sales tax depends on the nature of the contractual relationship among the parties. For example, the contractual arrangement of the client may be as a broker. A broker is a person who arranges transactions between buyers and sellers, but does not purchase the goods, does not have any power or authority to cause title to pass to the buyer, and does not pass, or cause to pass, title from the seller to buyer. See, e.g., California Sales Tax Counsel Ruling Nos. 585.0004 and 220.0160.350; Massachusetts Letter Ruling 87-2, 02/13/1987. A broker is providing a service and services are generally not subject to sales or use tax in Colorado. §39-26-104, C.R.S.

The arrangement may also be one of a principal and agent. Unlike a broker, an agent has authority to cause title to pass from the seller to the ultimate purchaser. The principal, rather than the agent, is generally considered to be either the seller or purchaser. The agent is providing a service to the principal and, as in the case of a broker, charges for those services are not subject to sales or use tax. Thus, an agent who discloses to the supplier that it is making a purchase on behalf of its principal is generally not liable for sales tax on the compensation the agent receives from the principal in connection with that purchase.

¹ Compare, also, Florida Technical Assistance Advisement 02(C)1-005, 08/29/2002 (foreign corporation, which provided service in Florida through independent contractors rather than corporation's employees, derived income from sources within Florida and had nexus for purposes of state income tax.) and *Avon Products, Inc. v. Wisconsin Department of Revenue*, I-8494, 03/14/1986 (Avon representatives created income tax nexus for Avon]; but see, Virginia Public Document Ruling No. 99-278, 10/14/1999 (a foreign corporation engages an in-state independent contractor to perform services for a customer of the foreign corporation, the services of the independent contractor do not create income tax nexus for the foreign corporation).

It is also possible that the arrangement you describe is a sale for resale in which your client is creating a taxable sale from itself to the national retailers. In general, a company that purchases goods from a supplier and resells the same to the ultimate consumer creates a taxable transaction and must collect sales tax on the marked-up price. In these cases, title to the goods passes from the supplier to the middleperson and from the middleperson to the ultimate consumer.

I note that, in the circumstance you describe, the client does not take physical possession of the goods. Although it is tempting to conclude that this creates an agency or brokerage arrangement, rather than a taxable resale of goods, it is not necessary for a retailer to take possession of the goods in order to take title to property. For example, a company that purchases the goods may direct the supplier to ship the goods directly to the ultimate consumer. The company's purchase from the supplier is an exempt wholesale sale and the company's sale to the ultimate consumer is a taxable retail sale, even though the retailer never has possession of the goods. In these cases, the retailer's "mark-up" is included in the sales tax calculation. See, e.g., Illinois Dept. of Rev. General Information Letter ST 93-0564-GIL.

Finally, it is worth noting that a fee charged by an agent or broker is subject to sales tax in some cases.² These typically occur when the agency or brokerage relationship has not been clearly formed or demonstrated. For example, an agent may be treated as the purchaser of goods and a reseller of those goods to the principal if the agent does not disclose to the supplier that it is purchasing goods as an agent of the principal, or that the agent does not separately state in its invoice to the principal the charges from suppliers or the agent's mark-up, or the agent retains refunds issued by a supplier. Compare, California Sales Tax Counsel Rulings Nos. 100.0016 and 0308; Texas Policy Letter Ruling No. 200703903L, 03/01/2007; Indiana Letter of Finding No. 04-970008; Texas Comptroller's Decision No. 34,323, 05/01/1997; Washington Tax Determination No. No. 05-0045, 24 WTD 413, 02/23/2005. The term, "mark-up," as used by your client, may indicate that the client is reselling the goods to the principal rather than acting as a "pass-thru" or conduit. Compare, e.g., Arizona Transaction Privilege Tax Ruling No. 06-1, 09/14/2006 ("commissions" charged by hotel to guests for arranging third-party services for guests are not taxable, but "mark-ups" are subject to sales tax) and Indiana Letter of Finding No. 04-970008. If the agent does not disclose to the seller that it is purchasing as an agent, the department will presume that the agent has taken title to the goods and has resold those goods to the principal. The initial purchase by the agent is an exempt sale for resale (wholesale sale) and the subsequent conveyance of

² The department has authority to treat agents and brokers as the retailer. Section 39-26-103(9)(e), states, "In addition, when in the opinion of the executive director it is necessary for the efficient administration of this section to treat any salesman, representative, peddler, or canvasser as the agent of the vendor, distributor, supervisor, or employer under whom he operates or from whom he obtains tangible personal property sold by him or for whom he solicits business, the director may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor, or employer for the collection and payment over of the tax." However, this statute does not address the more specific question of whether the agent's or broker's fee is also subject to tax.

title by the agent to the principal is a taxable sale. The agent must collect sales tax on the full purchase price paid by the principal, including the mark-up paid to the agent by the principal.

It is not possible in the context of a general information letter to determine the relationship among the parties you have described. Moreover, the letter does not contain sufficient information to make such a determination. If you would like an specific determination regarding this mark-up charge, you must submit this request as a private letter ruling.

Your letter also raises a question of whether the company has sufficient nexus to collect and remit sales tax if the mark-up is taxable. A retailer “doing business in this state” has the obligation to collect Colorado use tax. “Doing business in this state” is defined (§39-26-102(3), C.R.S.) to include the following activities:

(3) “Doing business in this state” means the selling, leasing, or delivering in this state, or any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property by a retail sale as defined in this section, for use, storage, distribution, or consumption within this state. This term includes, but shall not be limited to, the following acts or methods of transacting business:

(a) The maintaining within this state, directly or indirectly or by a subsidiary, of an office, distributing house, salesroom or house, warehouse, or other place of business;

(b) The soliciting, either by direct representatives, indirect representatives, manufacturers' agents, or by distribution of catalogues or other advertising, or by use of any communication media, or by use of the newspaper, radio, or television advertising media, or by any other means whatsoever, of business from persons residing in this state and by reason thereof receiving orders from, or selling or leasing tangible personal property to, such persons residing in this state for use, consumption, distribution, and storage for use or consumption in this state.

A number of federal court cases have limited the right of a state to impose on the retailer the obligation to collect state sales and use taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In general, these cases require that the retailer have nexus with Colorado. In order to have nexus in Colorado, a retailer must have a some minimal physical presence in the state, either directly in the form of a store or indirectly through sales agents, and engage in regular, purposeful in-state sales activities specifically directed at in-state customers. See, also, *Tyler Pipe Industries, Inc. v. Wash. State Dept. of Revenue*, 483 U.S. 232, 250 (1987) , holding that the applicability of tax requirements hinged on “whether the activities performed in [the taxing jurisdiction] on behalf of the taxpayer [were] significantly associated with the taxpayer's ability to establish and maintain a market ... for the sales.” For more information about this issue, see department publication FYI Sales 5 (sales tax information for out-of-state businesses). As noted earlier, the department generally will make a determination regarding nexus only in response to a request for a private letter ruling.

Miscellaneous

Pursuant to state law and department regulation 24-35-103.5, the Department will make public a redacted version of this letter. Your letter requesting this general information letter is not made public. I enclose a proposed redacted version of this letter. Please contact me

within 60 days from the date of this letter if you have any questions, comments, or objection concerning the redacted letter.

I hope this is helpful. As I noted earlier, general information letters provide only a general discussion of applicable law. You may request a private letter ruling which will provide a determination regarding the specific circumstances of your client. Please feel free to contact me if you have any questions.

Sincerely,

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